

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 10/695,283
Inventor(s) : Robert Richard Dykstra *et al.*
Filed : October 28, 2003
Art Unit : 1726
Examiner : Aaron J. Greso
Docket No. : 9086M
Confirmation No. : 3960
Customer No. : 27752
Title : Polymeric Assisted Delivery Using Separate Addition

APPEAL BRIEF

Mail Stop Appeal Brief - Patents

Commissioner for Patents

Via Electronic Filing

This Brief is filed pursuant to the appeal from the decision communicated in the Office Action mailed on August 16, 2011.

A timely Notice of Appeal was filed on November 15, 2011.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

STATUS OF CLAIMS

Claims 1 and 6-9 have been rejected in the application.

Claims 1 and 6-9 are appealed.

A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

STATUS OF AMENDMENTS

No amendment after the Final action of August 16, 2011, was filed.

SUMMARY OF CLAIMED SUBJECT MATTER

This invention relates to the use of vinyl acetate/vinyl pyrrolidone polymers to enhance the deposition of benefit agents, such as perfumes, onto surfaces such as fabrics, skin, hair and the like. (Page 1, lines 10-16.) The polymers do not encapsulate the benefit agents and, in fact, the polymer particle and benefit agents are added separately to the product matrix to secure the benefit of the invention (page 5, lines 30-35), i.e., the polymer/agent are "non-polymerically associated."

The multiple individual elements of Claim 1 are mapped as follows:

non-encapsulated: page 8, line 13;
benefit agent delivery system: page 5, line 13;
for receiving a benefit agent: page 1, line 11;
to a substrate: page 1, line 14;
aqueous: page 7, line 7;
dispersion: page 8, line 2;
0.002% - 0.05%: page 6, line 14;
water-insoluble polymer: page 10, line 1;
0.001% - 10% benefit agent: page 7, line 2;
glass transition temperature 50-120°C: page 9, line 12;
vinyl acetate monomer: page 10, line 29;
vinyl pyrrolidone monomer: page 12, line 3;
weight ratio 10:0.02 to 5:25: page 9, lines 1 and 2;

benefit agent and polymer non-polymerically associated: page 3, lines 14-15;
direct or indirect (deposition): page 4, paragraphs 2 and 3;
response factor at least about 1.5 per Protocol I or II: page 3, line 2 and page 14,
line 23 and page 20, line 1;
benefit agent as top note perfume raw material: page 13, line 12;
perfume accords: page 19, line 1;
Kovats Index 1000 – 1400: page 20, line 20;
dispersion with colloidal stabilizer: page 9, lines 30-31;
viscosity 7000 – 10,000 cps: page 25, line 14.

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

Whether Claims 1 and 6-9 are unpatentable under 35 USC 103(a) over Wells *et al.*, (US 5,883,058 and its incorporated reference US 5,120,532 to Wells *et al.*) in view of Hood (US 2002/0058015) as evidenced by Combariza *et al.* (Journal of High Resolution Chromatography 1994, Vol. 17, pp 643-646) and further in view of Garcia *et al.* (J. Soc. Cosmet. Chem., Vol. 27, pp 37-398, 1976) as evidence by Birtwistle (US 5,302,322).

ARGUMENTS

In a nutshell, the Examiner has cited various documents relating to personal care compositions such as hair care systems that contain a wide variety of polymers, e.g., for hair styling. Since the art-disclosed compositions can also contain benefit agents such as perfume, the Examiner concludes that the present compositions are obvious under §103.

What makes the Board's consideration of this matter necessary is that the Examiner appears to have been curiously selective about choosing and applying the prior art. Appellants' claims specifically require the use of vinyl acetate/vinyl pyrrolidone (VA/VP) polymers in their compositions and maintain that the art, taken as a whole, teaches away from such polymers.

More specifically, it is respectfully submitted that basing the rejections solely on the above-listed documents entirely smothers the real issue in this case. Appellants contend that the real issue is whether art, previously cited by the Examiner but shown to

teach away from the claimed invention, can now simply be ignored. Appellants urge that it cannot.

In this regard, the Board's attention is directed to the Guskey, *et al.* patent US 6,040,282, submitted as Evidence herein. This patent had been used in making all rejections in the Office Action mailed on September 14, 2010, also submitted as Evidence herein. Importantly, it had been cited to fill the many gaps in the disclosures of the other cited patents and journal articles. See paragraphs 1, 11, 12-13, 15, 16, 18, 19 and 27 of the September 14, 2010, Office Action.

In their amendment of December 10, 2010, Appellants had drawn the Examiner's attention to Column 8, lines 22-25 of Guskey '282, which teaches:

Surprisingly, it has been found that conventional styling polymers consisting of copolymers of vinyl pyrrolidone and vinyl acetate do not exhibit the curl retention benefits required of the present invention.

Thus, this key support for all earlier rejections specifically teaches away from using the polymers which are now the subject of the claims on appeal. It is, of course, basic patent law that, when, as here, the claimed invention involves what the cited reference teaches to avoid, "... [T]his is the very antithesis of obviousness." *In re Buehler*, 515 F.2d 1134, 1141 (CCPA 1975).

Subsequent claim rejections have not cited Guskey '282. Exactly why that is so and what has happened to Guskey to cause it to "disappear" from further consideration under §103 are matters that are not entirely clear from the record.

What is abundantly clear is that, even though the Examiner is no longer relying on Guskey '282 in making the rejections, that document must still be included in a full consideration of the entire field of the invention. As the CAFC has stated:

In determining whether such a suggestion can fairly be gleaned from the prior art, the full field of the invention must be considered; for the person of ordinary skill is charged with knowledge of the entire body of technological literature, including that which might lead away from the claimed invention. The {**11} Commissioner argues that since the PTO

is no longer relying on Farmer of the Bacon and Farmer article, the applicant is creating a “straw man”. It is indeed pertinent that those references teach against the present invention. Evidence that supports, rather than negates, patentability must be fairly considered. *In re Dow Chemical Co.*, 837F.2d 469; 1988 U.S. App. LEXIS 587; 5 USPQ 2d (BNA) 1529 (Fed. Cir. Jan. 25, 1988). See also, MPEP 2141.02 VI.

In view of the foregoing, Appellants urge that Guskey’s teaching away from the polymers claimed in the present invention is no “straw man” and must be considered when assessing patentability under §103.

Moreover, the Wells ‘532 patent that is cited for showing the vinyl acetate/vinyl pyrrolidone styling polymers specifically teaches (column 5, lines 5-10) that, “at levels below about 0.2% styling polymer, the present hair style hold benefits cannot be achieved . . .”

Accordingly, Appellants further submit that Wells ‘532 clearly teaches away from the usage level of the VA/VP polymer of Claim 1 herein. Indeed, Wells teaches a minimum VA/VP polymer usage level that is 4X that of the maximum usage level now recited herein. Even considering use of “about” in Claim 1, the Court has held that the term “about” does not include a 4-fold expansion of the numerical value of a parameter. *Conopco, Inc. v. May Department Stores Co.*, 46 F.3d 1556, 32 USPQ 1225, 1227 (Fed. Cir. 1994).

In short, the key art to be fairly considered herein either: i.) teaches away from the use of VA/VP polymers; and/or ii.) requires their usage levels to be far above that of the present claims.

Moreover, it is submitted that the sum total of the teachings of the other cited documents cannot be combined with Wells/Guskey to, somehow, rehabilitate the Examiner’s conclusion of obviousness under §103. The inconvenient fact will still remain that the key art teaches away from the claimed invention.

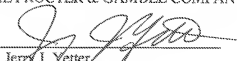
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SUMMARY

In view of all of the above, it is respectfully submitted that all claims are allowable. Reversal of the Examiner's decision is requested.

Respectfully submitted,

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Date: January 12, 2012
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CLAIMS APPENDIX

1. A non-encapsulated benefit agent delivery system suitable for delivering a benefit agent to a substrate, the benefit agent delivery system comprising an aqueous dispersion of from about 0.002% to about 0.05%, by weight, of a water-insoluble polymer particle and from about 0.001% to about 10%, by weight, of a benefit agent, wherein the polymer particle has a glass transition temperature from about 50°C to about 120°C and is a polymer of vinyl acetate and vinyl pyrrolidone at a weight ratio of vinyl acetate : vinyl pyrrolidone in the range of about 10 : 0.02 to about 5 : 2.5 and the polymer and the benefit agent are non-polymerically associated; and when the benefit agent delivery system is deposited onto the substrate, directly or indirectly, the Response Factor (RF) exhibited by the benefit agent delivery system is at least about 1.5, as measured by Test Protocol I or II, wherein said benefit agent is a member selected from the group consisting of top note perfume raw materials and perfume accords having a Kovats Index of from about 1000 to about 1400; said dispersion comprising a colloidal stabilizer; said dispersion having a viscosity in a range of between 7000 – 10000 cps.
6. The delivery system according to Claim 1 wherein the polymer particle comprises a polymer having a first affinity for a low Kovats index (LKI) perfume raw material having a Kovats Index of from about 1000 to about 1400 and a second affinity for a high Kovats index (HKI) perfume raw material having a Kovats Index of greater than about 1700, the first affinity is at least about 2 times greater than the second affinity, as measured by Affinity Test Protocol III.

7. The delivery system according to Claim 1 wherein the benefit agent is a perfume accord comprising one or more LKI perfume raw materials, each having a Kovats Index value of from about 1000 to about 1400, and one or more HKI perfume raw materials, each having a Kovats Index value of greater than about 1700.
8. The delivery system according to Claim 7 wherein the LKI perfume raw materials collectively provide a first Average Response Factor (ARF_{LKI}) and the HKI perfume raw materials collectively provide a second Average Response Factor (ARF_{HKI}); the perfume polymeric particle has a ratio of ARF_{LKI} / ARF_{HKI} of at least about 1.2.
9. A composition comprising the benefit agent delivery system according to Claim 1 and an adjunct ingredient.

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EVIDENCE APPENDIX

1. US Patent 6,040,282, Guskey *et al.*, March 21, 2000.
2. Office Action mailed September 14, 2010.

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RELATED PROCEEDINGS APPENDIX

None.